STATE OF MICHIGAN

COURT OF APPEALS

DIANN BOIK and GREG BOIK,

Plaintiffs-Appellees,

v

ALPENA GENERAL HOSPITAL,

Defendant-Appellant,

and

ALPENA COUNTY,

Defendant.

UNPUBLISHED
March 23, 2006

No. 258158
Alpena Circuit Court
LC No. 03-003349-NM

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant[1] appeals by leave granted from the trial court's order denying defendant's motion for summary disposition under MCR 2.116(7) and (10) of plaintiffs' medical malpractice claim. The trial court ruled that plaintiffs' affidavit of merit substantially complied with MCL 600.2912d, and plaintiffs' attorney reasonably believed that the affiant met the qualifications of MCL 600.2169. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the affidavit of merit did not sufficiently detail proximate cause nor was plaintiff's affiant, a radiology/mammography technician, properly qualified under MCL 600.2169(2) to certify the affidavit of merit with respect to the issue of proximate cause. We note that trial court erred in holding that substantial compliance with MCL 600.2912d could toll the statute of limitations. However, we affirm the trial court's order because we are not

[1] Because only Alpena General Hospital is participating in this appeal, the singular term "defendant" in this opinion refers to the hospital only and not to Alpena County, which is not a party to the appeal.

convinced that the statement of proximate cause was insufficient, and because we find that the affiant was properly qualified to prepare the affidavit of merit.

This Court reviews a trial court's denial of summary disposition de novo. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 357; 597 NW2d 250 (1999). In reviewing a decision under MCR 2.116(C)(7), the contents of the complaint are accepted as true unless specifically contradicted by affidavits or other appropriate documents. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). In reviewing a decision under MCR 2.116(C)(10), we consider all documentary evidence in the light most favorable to the nonmoving party to decide whether there is any genuine issue of material fact that would entitle the nonmoving party to judgment as a matter of law. *Diamond v Witherspoon*, 265 Mich App 673, 681-682; 696 NW2d 770 (2005); *Wilcoxon*, *supra* at 357-358. Similarly, statutory interpretation is also a question of law subject to de novo review. *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003).

The affidavit of merit statute, MCL 600.2912d, requires a medical malpractice plaintiff to file an affidavit of merit along with the complaint that certifies, among other things, that the standard of care was breached and that a breach of the standard of care proximately caused the plaintiff's injury. In a medical malpractice suit against an institutional defendant such as defendant, "the term 'party' under MCL 600.2169(1)(a) encompasses the agents for whose alleged negligent acts the hospital may still be liable." *Nippa v Bosford General Hosp (On Remand)*, 257 Mich App 387, 393; 668 NW2d 628 (2003). Because the alleged wrongdoers were radiology/mammography technicians, the applicable standard of care is that attributable to radiology/mammography technicians. *Id.*

Defendant first argues that the affidavit of merit was deficient because it did not sufficiently detail the manner in which the breach of the standard of care was the proximate cause of Mrs. Boik's injury under MCL 600.2912d(1)(d). To support its argument that the description of proximate cause in the affidavit of merit did not sufficiently detail the issue, defendant cites *Weymers v Khera*, 454 Mich 639, 563 NW2d 647 (1997). Notably, *Weymers* did not involve an affidavit of merit issue, but a claim that a conclusory affidavit from a physician, supplied *after discovery*, was not sufficient to establish a genuine issue of material fact concerning whether the alleged negligent act was the cause in fact of the plaintiff's injury. *Id.* at 646-648.

Had defendant brought the MCR 2.116(C)(10) summary disposition motion by arguing that the affidavit of merit did not create a genuine issue of material fact, then plaintiffs could have offered an affidavit from a qualified physician opining that breaching the standard of care proximately caused the injury. *Id.* at 646. Nothing in the language of MCL 600.2912d(1)(d) suggests that the causation statement in the affidavit of merit must raise a genuine issue of material fact. The gist of plaintiffs' affidavit of merit is that the improper positioning of Mrs. Boik's arms and pressure to the back of her neck caused cervical herniation. Defendant does not expressly state how the detail is lacking or what else should have been stated. Because defendant does state how this Court should make determine whether the statement was sufficient, this issue is waived. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) (holding that a party may not assert an error and then leave it up to this Court to discover and rationalize the basis for the claims, or to unravel and elaborate for the arguments).

Defendant next argues that because the radiology technician who signed the affidavit of merit would not be qualified under MCL 600.2169(2) to testify on the issue of proximate cause, the affiant was not qualified to file the affidavit of merit, nor could plaintiffs' attorney have reasonably believed the affiant would be properly qualified. Defendant also claims that although the affiant met the same practice requirement of MCL 600.2169(1), plaintiffs were required to file a second affidavit of merit from an expert qualified under subsection (2) to opine on the issue of proximate cause.

While this appeal was pending, a panel of this Court decided in a published opinion that the reference in MCL 600.2912d to MCL 600.2169 referred *exclusively* to MCL 600.2169(1) and was not intended by the Legislature to incorporate MCL 600.2169(2). *Sturgis Bank & Trust Co v Hillsdale Comm Health Ctr*, 268 Mich App 484, 491-492; 708 NW2d 453 (2005), lv pending. More specifically, the *Sturgis* Court stated that a medical malpractice plaintiff is "only required to submit an affidavit of an expert practicing or teaching in the same health care profession as those accused of wrongdoing and that the affidavit contain the necessary elements listed in § 2912d(1)(a)-(d)." *Id.* at 495-496. Although both affiants in *Sturgis* would have been qualified to meet the same practice qualification under MCL 600.2169(1), *id.* at 492, arguably neither would have been qualified to opine under MCL 600.2169(2) that a breach of the standard of care proximately caused the patient's injuries. In *Sturgis*, this Court also reversed the trial court's holding that "two affidavits of merit were necessary, one from a nurse because this was the health profession practiced by those accused of malpractice and one from a doctor who could aver with regard to proximate cause." *Id.* at 488, 495-496.

Because defendant argues that two affidavits were required for similar reasons, defendant's argument must also fail. Notably, defendant does not challenge the affiant's qualifications under MCL 600.2169(1). Also, *Sturgis* is not distinguishable from the present case because the defendant in *Sturgis* similarly argued that the affidavit of merit was defective because it was signed by a nurse and nurse practitioner instead of a doctor who could testify to proximate cause, even though the affiants practiced in the same practice as the alleged wrongdoer. *Id.* at 487. However, the affiant in the case at bar was properly qualified under MCL 600.2912d and MCL 600.2169(1) to file the affidavit of merit because the affiant "practice[ed] . . . in the same health care profession as those accused of wrongdoing and . . . the affidavit contain[ed] the necessary elements listed in § 2912d(1)(a)-(d)." *Id.* at 495-496.

Finally, it is unnecessary to reach plaintiffs' alternative argument that their attorney reasonably believed the affiant was properly qualified. *Id.* at 489 (holding that the Court need not reach the plaintiff's alternative arguments, including whether the plaintiff reasonably believed the affiants were properly qualified, given the Court's holding that the affiants were, in fact, properly qualified). Although defendant questions the trial court's decision to allow plaintiffs to file a supplemental affidavit of merit from a doctor, this issue was not raised in defendant's statement of questions presented. Thus, this issue has not been properly presented for appellate review. *Hammack v Lutheran Social Services of Michigan*, 211 Mich App 1, 7; 535

NW2d 215 (1995). Moreover, it is not necessary to reach this issue because the original affiant was properly qualified under MCL 600.2169(1).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra